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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

FACEBOOK'S STATUS UPDATE

Judge: Hons. Vince Chhabria and
Jacqueline Scott Corley
Courtroom: VIA VIDEOCONFERENCE
Hearing Date: June 23, 2021
Hearing Time: 8:30 a.m.

1 Plaintiffs' separate submission is unauthorized, and the Court should strike it. Plaintiffs'
 2 decision to file a separate statement also brings into focus two issues that are impeding the success of
 3 discovery mediation: (i) Plaintiffs' refusal to respect mediation confidentiality, and (ii) Plaintiffs'
 4 conduct is undermining the mediation process.¹

5 **First**, Plaintiffs' statement reveals confidential mediation information. This is not the first
 6 time. At the last discovery conference, Plaintiffs' counsel revealed publicly a position Facebook had
 7 taken in mediation about a potential case schedule—an issue the parties are also continuing to
 8 mediate. Plaintiffs' refusal to respect mediation confidentiality puts Facebook in an untenable
 9 position. When Plaintiffs reveal confidential aspects of ongoing mediations in court, Facebook must
 10 either stay silent on key aspects of ongoing disputes or reveal confidential mediation
 11 communications.²

12 **Second**, Plaintiffs have presented an issue to the Court the parties are actively discussing in
 13 mediation and on which the parties have not yet reached agreement or impasse. This is another
 14 attempt to end-run the mediation process in the hopes of obtaining an off-the-cuff ruling. It is also
 15 part of a broader and concerning pattern of Plaintiffs' refusal to participate meaningfully in discovery
 16 mediation.

20 ¹ The Court made clear at our very first discovery conference that all hearing submissions must be
 21 submitted jointly and that the parties must exchange their portions of the joint statements at least 24
 22 hours before the statements are due so that each side would have an opportunity to respond. Dkt.
 23 404, ¶ 6. This week, Plaintiffs have chosen to disregard both of those instructions. After a discovery
 24 mediation session yesterday afternoon, Facebook sent Plaintiffs a draft proposed joint statement, sim-
 25 ilar in form and content to the parties' two most recent (and truly joint) joint submissions. Plaintiffs
 26 waited until this morning to respond, 90 minutes before the joint filing was due, at which point they
 27 sent Facebook a statement that, as Facebook further explains below, breached mediation confidential-
 ity and sought to tee up a proposal that Plaintiffs provided for the first time today and goes to an issue
 that is being mediated. Facebook told Plaintiffs it could not agree to their last-minute revised state-
 ment and suggested that the Parties seek a one-week continuance of the conference to continue medi-
 ating the issue Plaintiffs raised. Plaintiffs refused. Facebook then suggested that the parties submit a
 short joint statement and take up the issue Plaintiffs wished to raise in discovery mediation. Plaintiffs
 again refused and then told Facebook they were not interested in filing a joint statement and intended
 to file a separate statement of their own.

28 ² Plaintiffs have foreshadowed that they similarly intend to raise issues to Judge Chhabria tomorrow
 that the parties are actively mediating.

1 Discovery mediation has facilitated an orderly and civil approach to discovery disputes in this
2 case. It has also allowed the parties to resolve—or at least narrow—disputes without unnecessary
3 letter writing, briefing, and judicial intervention.

4 The mediation process was working well, until Plaintiffs decided to opt out. For several
5 weeks, Plaintiffs have insisted that they get to decide whether to mediate discovery disputes or
6 bypass mediation altogether and seek immediate judicial intervention on any dispute they do not want
7 to mediate. For instance, just last week, Plaintiffs sent Facebook a letter outside of mediation
8 declaring that they refuse to engage in mediation at all—and will bring imminent motions—with
9 respect to the data they seek regarding the Named Plaintiffs’ Facebook accounts and the scope of
10 Plaintiffs’ requests with respect to so-called “business partners.” These are the very disputes that
11 drove the Court to propose discovery mediation in the first place. Yet Plaintiffs have refused to even
12 discuss these topics in mediation.

13 The Court gave the parties the option to voluntarily participate in mediation, but did not give
14 the parties authority to pick and choose which issues they would mediate. The Court was very clear
15 that discovery in this case had reached a boiling point and that the Court did not wish to make
16 arbitrary decisions. So, the Court gave the parties two options—mediate their discovery disputes or
17 retain a court reporter to transcribe the final meet and confer on each issue. The parties agreed to
18 mediate. In order for mediation to be successful, the parties must be committed to working through
19 all discovery disputes in mediation in good faith—otherwise the process has no teeth. We now have
20 two talented and experienced mediators who have worked many dozens of hours to impose structure
21 and efficiency in this case but who now find themselves constrained by their lack of authority to set
22 structure and enforce rules.

23 By effectively opting out of discovery mediation at their whim, Plaintiffs are undermining the
24 mediation process and the agendas set by the mediators by forcing the reprioritization of issues as
25 they see fit. This pattern is all too familiar: before mediation, Plaintiffs bounced from one
26 supposedly urgent issue to the next and back again—under threat of expedited motion practice—
27 making it impossible for the parties to close out issues. Judge Andler and Mr. Garrie have been
28 tremendously effective in prioritizing issues and keeping the parties on track.

1 Unfortunately, Plaintiffs are now working at cross-purposes with the mediation. At the same
 2 time Judge Andler and Mr. Garrie are trying to work with the parties to address issues in an orderly
 3 fashion, Plaintiffs are injecting chaos by peppering Facebook outside of mediation with discovery
 4 dispute letters, which threaten Facebook (and, by default, the mediators) with expedited motions
 5 unless Facebook capitulates immediately. Indeed, while the parties were mediating a dispute
 6 regarding the timing of depositions, Plaintiffs went ahead and served deposition subpoenas on six
 7 former Facebook employees and indicated they intend to serve at least 20 more. Plaintiffs have now
 8 informed Facebook that they refuse to mediate the timing of depositions—which is likely to force
 9 unnecessary motion practice. These tactics are hijacking the orderly agendas Judge Andler puts in
 10 place and (once again) making it impossible for the parties to work through issues in an efficient and
 11 systematic manner.

12 Facebook suggests that the mediators should be empowered to address Plaintiffs' refusal to
 13 meaningfully engage in mediation and follow the mediator's instructions. Facebook has made a
 14 concrete proposal to Judge Andler and Mr. Garrie that is designed to accomplish a more efficient and
 15 effective mediation process, which is also in line with the Court's repeated instructions that it does
 16 not wish to appoint a special master. Due to mediation confidentiality, Facebook does not disclose its
 17 position here, but is happy to at the Court's request. In the meantime, Facebook respectfully asks the
 18 Court to remind the parties of the following:

- 19 1. Mediation communications are strictly confidential. The parties may inform the Court
 20 that they are mediating certain issues, but may not disclose the substance of their
 discussions or raise issues that are being mediated;
- 21 2. The Court ordered the parties to mediate their discovery disputes. All discovery
 22 disputes must be mediated and should only be raised to the Court once the mediators
 determine the parties are at impasse;
- 23 3. The parties must cooperate in good faith with the mediators, including by respecting
 24 their agendas.

1 DATE: June 22, 2021

Respectfully submitted,

2 **GIBSON, DUNN & CRUTCHER, LLP**

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